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No. 16-992

Supreme Court, U.S.
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In The
Supreme Court of the United States

MARISA N. PAVAN, et al.,

Petitioners,

v.

NATHANIEL SMITH, M.D., MPH,

Respondent.

On Petition For A Writ Of Certiorari To The Supreme Court Of Arkansas

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Petitioners are two female married couples who conceived children through artificial insemination. Both couples have received valid birth certificates listing their respective children's biological mother and her spouse. They filed this action seeking to invalidate a state statutory scheme that generally provides for listing a birth mother's husband on a marital child's birth certificate (via a presumption of biological parentage) but does not contain a similar provision for listing a mother's same-sex spouse. As Respondent repeatedly pointed out below, Petitioners challenged the wrong provision of Arkansas law. The challenged provisions would not determine whether a birth mother's spouse was entitled to parental rights – and inclusion on a birth certificate – if Petitioners were opposite-sex couples that conceived using artificial insemination. Instead, the birth mother's opposite-sex spouse's parental rights would be governed by Arkansas's artificial insemination statute. But Petitioners have not sought relief under that statute. On the record presented in this case, the question presented is:

Whether the Fourteenth Amendment requires a State to include a biological mother's spouse – who definitively lacks any biological relationship to the child – on the child's birth certificate.

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OPINIONS BELOW

The opinion of the Arkansas Supreme Court (App., *infra*, App. 1a-25a) is reported at 2016 Ark. 437, ___ S.W.3d ___. The opinion and order of the Circuit Court of Pulaski County, Arkansas (App., *infra*, App. 48a-72a) are not reported.

JURISDICTION

The judgment of the Arkansas Supreme Court was entered on December 8, 2016. The petition for a writ of certiorari was filed on February 13, 2017. The jurisdiction of this Court is invoked under 28 U.S.C. 1257.

STATEMENT

Petitioners are two female married couples who conceived children through artificial insemination. They ask this Court to review an Arkansas Supreme Court decision holding that a state law that generally requires a birth mother's husband – but not a same-sex spouse – be listed on a birth certificate is constitutional. Petitioners seek review despite the fact that Respondent has already issued valid birth certificates listing each child's biological mother and her spouse. They also seek review even though Respondent has conceded that another (unchallenged) provision of Arkansas law – providing that a child born to a married woman by means of artificial insemination is deemed

the legitimate natural child of the woman and her husband – would fail rational basis review unless it is read to apply equally to a birth mother's same-sex spouse.

1.a. Arkansas law requires that every child born in the state receive a birth certificate. Ark. Code Ann. 20-18-401(a). That certificate is issued by the Arkansas Department of Health (ADH) based on information supplied by the hospital where the child was born. *See* Pet. App. 86a; *see also* Ark. Code Ann. 20-18-401(a). "ADH does not independently investigate the vital information submitted by a hospital when a woman gives birth." Pet. App. 86a-87a. Instead, ADH prepares a certificate "based upon information submitted by the hospitals without regard to the sexual orientation, gender, or marital status of the woman giving birth to the child, and without regard to the sexual orientation, gender, or marital status of any other parent of the child." Pet. App. 87a. Additionally, "[a]fter ADH issues an original birth certificate based upon information submitted by a hospital, the hospital may amend the original birth certificate within one year if the hospital determines that there is an error or omission in the vital information originally submitted." *Id.*

Arkansas birth certificates list a child's name, the child's time and place of birth, and the child's parent or parents. *See* Ark. Code Ann. 20-18-401(a)-(c); App. 87a. Unless otherwise required, in Arkansas, a child's "mother is deemed to be the woman who gives birth to the child." Ark. Code Ann. 20-18-401(e). Where "the mother was not married at the time of either conception or birth or between conception and birth, the name

of the father" will not be included on a birth certificate "without an affidavit of paternity signed by the mother and the person to be named as the father." Ark. Code Ann. 20-18-401(f)(2). By contrast – since in the overwhelming majority of cases, the mother's husband is a marital child's biological father – Arkansas Code Section 20-18-401(f) presumes that "[i]f the mother was married at the time of either conception or birth," the mother's husband is "the father of the child." Ark. Code Ann. 20-18-401(f)(1). That presumption does not apply where a court order or other statute dictates a different result. *See* Ark. Code Ann. 20-18-401(f)(1)(A)-(B). Thus, where a court determines that someone else is a child's father or, alternatively, the mother, husband, and putative father attest that the putative father is a child's biological father, that putative biological father must be listed on a child's birth certificate. *See id.*

Like many other states, Arkansas also has more specific provisions that govern paternity determinations when children are conceived using assisted reproduction. *See* Ark. Code Ann. 9-10-201 (governing artificial insemination and surrogacy). Most relevant here, Arkansas Code Section 9-10-201(a) provides that, "[a]ny child born to a married woman by means of artificial insemination shall be deemed the legitimate natural child of the woman and the woman's husband if the husband consents in writing to the artificial insemination." Ark. Code Ann. 9-10-201(a). As a result, where a mother's husband agrees to the use of anonymous donor sperm for artificial insemination,

Arkansas law deems the husband the child's natural father (even though he is definitively not the biological father) and he will be included on the child's birth certificate. *See id.*; *Brown v. Brown*, 125 S.W.3d 840, 841 (Ark. Ct. App. 2003). That provision is a narrow exception to Arkansas's generally applicable, biology-based paternity rules.

In addition to those provisions, Arkansas law also establishes procedures for amending and issuing new birth certificates. For instance, ADH will issue a new birth certificate where a child has been adopted, where a court has made a paternity determination different than that reflected on the original birth certificate, where a child's parents subsequently marry, or where "both parents have acknowledged paternity of the [child] and request that the surname be changed from that shown on the original certificate." Ark. Code Ann. 20-18-406(a); *see* Ark. Admin. Code 007.12.1-5.2 (child is legitimated and ADH will issue a new birth certificate where biological parents subsequently marry and attest to paternity). When ADH issues a new birth certificate, the original is sealed. *See* Ark. Code Ann. 20-18-406(b). As above, in issuing new certificates, where an adoption or other change warranting an amendment has occurred, "ADH processes such amendments without regard to the sexual orientation, gender, marital status, or any other characteristic of any parent or intended parent of a child." Pet. App. 87a.

b. Arkansas's vital records system is designed to ensure that the state's records are as accurate as practicable. *See* Pet. App. 86a-87a (explaining that ADH

relies on the information provided by a hospital and "does not independently investigate" information); *id.* at 87a-88a (ADH relies on electronic birth certificate information transmitted by the hospital); *id.* at 89a ("The overarching purpose of the vital records system is to ensure that vital records, including birth certificates as well as death certificates and marriage certificates, are accurate regarding the vital events that they reflect."). Accuracy is "critical" because Arkansas uses birth records identifying a child's biological parents "to compile, maintain, and analyze vital statistics" and conduct "public health research and identif[y] public health trends." *Id.* at 89a.

Accuracy is also in the child's best interest "because a child may need to access information about biological parentage for health-related reasons." Pet. App. 89a; *id.* ("The State has a legitimate interest in maintaining such information (even if under seal and releasable only pursuant to a court order) in order to protect the future health of the child."). That is why "[e]ven in the case of surrogacy where the biological mother is never intended to be the legal parent of a child, [Arkansas's] statutes provide that an initial birth certificate is issued reflecting the biological mother as a parent, and then an amended birth certificate is issued reflecting the intended parent(s) as legal parent(s)." *Id.*; *see also id.* (original birth certificates in cases of adoption are maintained under seal for the same reason).

2. After Petitioners' children were born using artificial insemination, both couples completed applications

to receive birth certificates that included both the child's biological mother and her spouse. *See* Pet. 7-8. Only the names of the biological mothers were transmitted to ADH by the hospitals where Petitioners' respective children were born, and ADH issued birth certificates reflecting the information that it received. *See* Pet. App. 87a-88a.

3.a. Petitioners thereafter filed a complaint in Pulaski County, Arkansas Circuit Court "seeking a declaration that the refusal to issue birth certificates with the names of both spouses . . . violated their constitutional rights to equal protection and due process" and "an order requiring [Respondent] to issue corrected birth certificates naming both spouses." Pet. App. 3a.[1] Petitioners also sought a declaration that Sections 20-18-401 and 20-18-406 were unconstitutional as written. *See* Pet. App. 53a ("The plaintiffs seek declaratory judgment alleging that two statutes [Sections 20-18-401 and 20-18-406] addressing birth certificates are unconstitutional in whole or part[.]"). They claimed those provisions – and in particular Section 20-18-401(f)'s general presumption that a child born to a married mother is the child of the mother's husband – must be interpreted to apply equally to a mother's female spouse. *See, e.g.*, Pet. 8; *id.* at 20-24; *id.* at 27-28. Petitioners did not mention, cite, or otherwise allude to Section 9-10-201(a)'s artificial insemination paternity provisions. *See* Pls.' Compl. for Decl. and Inj.

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[1] Petitioners were joined by another same-sex female couple that was not married at the time of their child's birth. *See* Pet. 13 n.3.

Relief, Pulaski Cty., Ark. Cir. Ct., No. 60CV-15-3135 (July 13, 2015).

Petitioners and Respondent filed cross-motions for summary judgment. *See* Pet. App. 49a. In his argument to the state circuit court, Respondent noted that Petitioners had apparently sought to invalidate the wrong provisions of the Arkansas Code since they had conceived children using artificial insemination. Respondent explained that Section 9-10-201 – and not Sections 20-18-401 and 20-18-406 – govern paternity (and thereby who is listed on a birth certificate) of a child born using artificial insemination. *See* Tr. of Proceedings, Pulaski Cty., Ark. Cir. Ct., No. 60CV-15-3153, pp. 38-39 (Nov. 23, 2015). Indeed, Respondent suggested that Section 9-10-201 "should have been where we started and ended in this case." *Id.* at p. 38.

Consistent with Petitioners' complaint, the state circuit court declined to address Section 9-10-201. *See* Pet. App. 48a-66a. Instead, the state circuit court focused entirely on – and struck down large parts of – Sections 20-18-401 and 20-18-406. *See id.* The state circuit court also ordered Respondent "to immediately issue amended certificates of birth to [Petitioners] . . . evidencing both spouses as the parents of their respective minor children." *Id.* at 48a. Respondent complied with that order, and Petitioners' children have received valid birth certificates listing both spouses as parents. *See* Pet. 10 n.2.

b. Respondent appealed the state circuit court's decision striking down whole portions of Sections

20-18-401 and 20-18-406 to the Arkansas Supreme Court. In both "his brief[ing] and during oral argument" before the Arkansas Supreme Court, Respondent echoed what he had said before the state circuit court and argued that Petitioners had brought an action to invalidate the wrong provisions of Arkansas Code. Pet. App. 22a; *see also* Res. Ark. S. Ct. Br. Arg. 28 ("Appellees challenged the wrong statute and, accordingly, the circuit court focused on the wrong statute."); Res. Ark. S. Ct. Reply Br. Arg. 13-15 (similar). Respondent explained that because Petitioners had used artificial insemination, if they were an opposite-sex couple, they would be subject to Section 9-10-201(a) and, pursuant to that provision, the mother's husband would be deemed the child's natural parent and listed on the birth certificate. *See* Pet. App. 22a; *id.* at 82a-83a; Res. Ark. S. Ct. Br. Arg. 28-29; Res. Ark. S. Ct. Reply Br. Arg. 13-15.

Moreover, during the Arkansas Supreme Court proceedings, Respondent expressly conceded that Section 9-10-201(a)'s failure to incorporate same-sex spouses would "fail[] equal protection under the plain old rational basis standard" and, as a result, "the remedy should be to have the Court either read or revise the word husband in [Section 9-10-201(a)] to mean spouse."[2] Pet. App. 82a-83a; *see also* Res. Ark. S. Ct. Br. Arg. 29; Res. Ark. S. Ct. Reply Br. Arg. 14. Under that

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[2] Petitioners mistakenly claim (Pet. 9-10) that Respondent raised this argument for the first time during oral argument before the Arkansas Supreme Court. *See* Res. Ark. S. Ct. Br. Arg. 29; Res. Ark. S. Ct. Reply Br. Arg. 14.

approach, a birth mother's spouse "would be entitled to be placed on the birth certificate initially when they were at the hospital and through the hospital's submission to [ADH]." Pet. App. 83a; *see also* Res. Ark. S. Ct. Reply Br. Arg. 14 ("[T]he State interprets section 9-10-201(a) to authorize and control birth certificates of children born through donor insemination. Absent further legislative action, the State would issue birth certificates for children born through donor insemination reflecting both the birth-mother and her spouse (including a same-sex spouse) if the Court requires, as a matter of constitutional law, a gender-neutral reading of section 9-10-201(a).").[3]

Because the state circuit court had failed to address Section 9-10-201(a), the Arkansas Supreme Court declined to address Section 9-10-201(a) or whether Petitioners might be entitled to relief under that provision. *See* Pet. App. 22a-23a (declining to address Respondent's argument because "the circuit court did not rule on the constitutionality of [Section 9-10-201(a)]"); *id.* (citing Arkansas procedural rule requiring party to obtain a ruling from state circuit court). Instead, the Arkansas Supreme Court only addressed Petitioners' claim that Sections 20-18-401 and 20-18-406 violate due process and equal protection.

In conducting its review, the Arkansas Supreme Court rejected Petitioners' argument that *Obergefell v.*

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[3] Respondent also suggested that the Arkansas General Assembly could modify that provision. Res. Ark. S. Ct. Br. Arg. 30. During its most recent session, the Arkansas General Assembly did not modify the language of that provision.

Hodges, 135 S. Ct. 2584 (2015), mandates that a mother's same-sex spouse be included on a birth certificate. *See* Pet. App. 11a-20a. As Respondent had argued, the Arkansas Supreme Court explained that *Obergefell* did not concern birth certificates, but a same-sex couple's right to marry.[4] *See id.* at 11a-12a. Indeed, *Obergefell* "mention[s] birth certificates only once" and that "single mention . . . [is] related only to its observation that states confer[] benefits on married couples, which in part demonstrate[s] that 'the reasons marriage is fundamental under the Constitution apply with equal force to same-sex couples.'" Pet. App. 12a (quoting 135 S. Ct. at 2599). As a result, the court concluded that *Obergefell* did not, on its own, render Sections 20-18-401 and 20-18-406 unconstitutional. *See id.* at 13a.

The Arkansas Supreme Court further concluded that Sections 20-18-401 and 20-18-406 do not run afoul of equal protection principles because a "birth certificate evidences biological relationships" and Arkansas's statutory scheme is designed to ensure – with very narrow exceptions – that an original birth certificate reflects a child's biological parentage. Pet. App. 20a; *see*

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[4] Petitioners erroneously claim that "[Respondent] conceded that, under *Obergefell*, Arkansas's law that when a married couple uses donor insemination to have a child, they are both legal parents, must be applied equally to same-sex spouses." Pet. 10. Respondent made *no* such concession. Rather, Respondent conceded that treating same- and opposite-sex couples differently under the artificial insemination statute would "fail[] equal protection under the *plain old rational basis* standard." Pet. App. 82a (emphasis added).

also, e.g., id. (noting that to ensure that result, Arkansas "statutes penalize anyone who knowingly makes a false statement in a vital record"). Consistent with that goal, the Arkansas Supreme Court reasoned that "[i]t does not violate equal protection to acknowledge basic biological truths" that "the female spouse of a biological mother . . . does not have the same biological nexus to the child that the biological mother or the biological father has." Pet. App. 20a-21a. Indeed, quoting *Tuan Anh Nguyen v. INS*, 533 U.S. 53 (2001), the Arkansas Supreme Court explained that, "[t]he difference between men and women in relation to the birth process is a real one, and the principle of equal protection does not forbid Congress to address the problem at hand in a manner specific to each gender." Pet. App. 21a (quoting 533 U.S. at 73).

The Arkansas Supreme Court likewise rejected Petitioners' due process argument because Sections 20-18-401 and 20-18-406 do not concern the validity of Petitioners' marriages or parental rights. *See* Pet. App. 20a (Petitioners improperly "conflated distinct categories of marriage, parental rights, and vital records"). Rather, the Arkansas Supreme Court explained that Sections 20-18-401 and 20-18-406 concern the State's interest in maintaining accurate vital records and are focused "on the relationship of the biological mother and the biological father to the child, not on the marital relationship[.]" Pet. App. 14a.

Moreover, while Petitioners argued that "the failure to include both same-sex spouses on birth certificates or amended birth certificates may adversely

affect their legal status regarding the minor children," they failed to provide any "evidence, or even statutory authority, to support their assertion that any of these issues are answered by who is listed as the mother and the father on a birth certificate." Pet. App. 19a; *see also id.* ("In its ruling . . . the circuit court stated that its order 'does not legally resolve any of these potential issues.' "). Consequently, Petitioners were left merely arguing that due process required the inclusion of the mother's female spouse on the birth certificate. *See* Pet. App. 20a. But "[o]n the record presented," the Arkansas Supreme Court held that it was impossible to conclude "that naming the nonbiological spouse on the birth certificate of the child is an interest of the person so fundamental that the State must accord the interest its respect under either [Section 20-18-401 or Section 20-18-406]." *Id.* at 20a.

REASONS FOR DENYING THE PETITION

Petitioners sought to enjoin two general birth certificate provisions that – even if Petitioners were opposite-sex couples – would *not* determine the birth mother's spouse's parental rights. Instead, as Respondent has *continuously* pointed out, just like opposite-sex couples who conceive children using artificial insemination, the paternity of Petitioners' children (and Petitioners' inclusion on their respective children's birth certificates) is governed by Arkansas's artificial insemination statute. Yet rather than seek relief under that provision, Petitioners ask this Court

to review an Arkansas Supreme Court decision correctly rejecting their claims challenging a statute that would not govern similarly situated opposite-sex couples. Petitioners also ask this Court to conduct that review despite the fact that they long ago received valid birth certificates listing their respective children's biological mother and her spouse. Review is not warranted.

I. The Arkansas Supreme Court's decision is consistent with equal protection and due process.

Petitioners' principal argument for review is that the Arkansas Supreme Court's decision conflicts with *Obergefell v. Hodges*. But despite Petitioners' best efforts to transform *Obergefell* into a case about birth certificates and parental rights, that case neither "expressly or impliedly" addressed those issues. Pet. App. 11a. Instead, *Obergefell* established "that the right to marry is a fundamental right inherent in the liberty of the person, and under the Due Process and Equal Protection Clauses of the Fourteenth Amendment couples of the same-sex may . . . exercise the fundamental right to marry." 135 S. Ct. at 2604-05.

1. The Arkansas Supreme Court correctly concluded that *Obergefell*'s holding neither establishes nor implies that a biological parent's same (or opposite) sex spouse enjoys a constitutionally protected due process right to be included on a child's birth certificate. *Obergefell* mentions "birth and death certificates"

only once and even then only among a lengthy list of "aspects of marital status" that various States chose to bestow on married couples. 135 S. Ct. at 2601. But far from bestowing a due process right to be included on a marital child's birth certificate, that language merely reflects this Court's recognition that "throughout our history" States have "made marriage the basis for an expanding list of governmental rights, benefits, and responsibilities." *Id.* Indeed, rather than establishing a list of preordained rights, benefits, and responsibilities, *Obergefell* candidly acknowledged that, "the States are in general free to vary the benefits they confer on all married couples." *Id.* Petitioners do not acknowledge that language.

Instead, Petitioners simply assert that because *Obergefell* held that same-sex couples have a due process right to marry, any children born into that marriage must be considered the children of both the biological mother and her spouse. Yet Petitioners do not cite any authority for that proposition. Nor does any such authority exist. To the contrary, this Court has never held that a spouse – who has *no biological relationship* to a child – has an automatic due process right to a parental relationship with that child. Indeed, while biological parents have a well-recognized due process right to direct the care, custody, and control of their children, an individual who is not a biological parent has no such interest. *See Troxel v. Granville*, 530 U.S. 57, 65-66 (2000); *Mullins v. Oregon*, 57 F.3d 789, 794 (9th Cir. 1995); *see also Miller v. California*,

355 F.3d 1172 (9th Cir. 2004). That is true whether a birth mother's spouse is of the same or opposite sex.[5]

Further, while this Court has acknowledged that "biological relationships are not exclusive [of the] determination of the existence of a family," other forms of parentage – be it adoption or common law theories of *in loco parentis* – turn on whether that relationship is in the best interest of the child, not on a prospective parent's liberty interest. *Smith v. Org. of Foster Families for Equal. & Reform*, 431 U.S. 816, 843 (1977). Indeed, "the usual understanding of 'family' implies biological relationships, and most" of this Court's due process "decisions treating the relation between parent and child have stressed this element." *Id.* Thus, contrary to Petitioners' claim, marriage to a child's biological parent does not automatically confer a protected liberty interest in a parental relationship on the biological parent's same- or opposite-sex spouse.

And consistent with that understanding, courts across the country have also long recognized that parental rights flow from biology, not marriage. *See E.E. v. O.M.G.R.*, 20 A.3d 1171, 1174-75 (N.J. Super. Ct. Ch. Div. 2011); *Mintz v. Zoerning*, 198 P.3d 861, 863 (N.M.

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[5] Likewise, a child has no constitutionally protected interest in being adopted, or otherwise cared for, by someone who is not the child's biological parent, including the spouse of the child's biological parent. *See, e.g.*, *Lofton v. Sec'y of Dep't of Children & Family Servs.*, 358 F.3d 804, 811 (11th Cir. 2004) ("no fundamental right to adopt or to be adopted"); *In re Adoption of T.K.J.*, 931 P.2d 488, 494-95 (Colo. App. 1996) (children lack liberty interest in care from potential adopting parent).

Ct. App. 2008) ("The parent and child relationship may be established between a child and the natural father . . . and the relationship extends to every child and parent, regardless of the marital status of the parents."); *In re Audrey S.*, 182 S.W.3d 838, 860 n.22 (Tenn. Ct. App. 2005) (biological parent's rights "exist notwithstanding the marital status of the child's biological parents" (citing *Lehr v. Robertson*, 463 U.S. 248, 262 (1983), and other cases)); *In Interest of R.C.*, 775 P.2d 27, 29 (Colo. 1989) ("The biological father is normally presumed to be the legal father of a child.").

2. As the Arkansas Supreme Court correctly concluded, Petitioners likewise fail to provide any basis for concluding that Sections 20-18-401 and 20-18-406 violate equal protection. Those sections do not "draw distinctions between individuals based solely on differences that are irrelevant to a legitimate governmental objective." *Lehr*, 463 U.S. at 265; *see also Nordlinger v. Hahn*, 505 U.S. 1, 10 (1992) (Equal Protection Clause "simply keeps governmental decisionmakers from treating differently persons who are in all relevant respects alike"). Rather, Sections 20-18-401 and 20-18-406 treat biological (or natural) and adoptive parents, who have legally recognized parental rights, differently than persons who do not have such rights. Those distinctions also serve important – if not compelling – public health objectives.

Section 20-18-401 generally governs the issuance of original birth certificates, and it distinguishes between biological and non-biological parents. For example, Section 20-18-401(e) provides that in issuing an

original certificate, a child's "mother is deemed to be the woman who gives birth to the child, unless otherwise provided by state law or determined by a court of competent jurisdiction prior to the filing of the birth certificate." And to ensure biological accuracy, that presumption applies "[e]ven in the case of surrogacy where the biological mother is never intended to be the legal parent of a child" with an initial certificate reflecting the biological mother and "then an amended birth certificate [being] issued reflecting the intended parent(s) as legal parent(s)." Pet. App. 89a. Here, Petitioners' children received certificates listing their biological mother.

Consistent with the goal of ensuring biological accuracy, Section 20-18-401(f) likewise requires that a child's biological father generally be included on a birth certificate. Section 20-18-401(f)(2), for instance, provides that when "the mother was not married at the time of either conception or birth or between conception and birth," a father's name is to be included where the biological mother and the father execute affidavits attesting to paternity. And reflecting the fact that in the overwhelming majority of cases, the mother's husband is a marital child's biological father, Section 20-18-401(f)(1) presumes that when "the mother was married at the time of either conception or birth," the child is her husband's child and generally requires that his name be listed "on the certificate as the father of the child." But that presumption (and the requirement that he be listed on the birth certificate) does not apply where "[p]aternity has been determined otherwise by

a court of competent jurisdiction" or the mother, husband, and putative biological father attest that the husband is not the father and that the putative father is the child's father. Ark. Code Ann. 20-18-401(f)(1). Instead, in such a case, the biological father will be listed on the child's birth certificate. *See id.* Moreover, as discussed below, another statute (that Petitioners opted not to challenge) controls paternity determinations when a child is conceived using artificial insemination. *See infra* at p. 23.

Similarly, Section 20-18-406, which governs the issuance of new birth certificates, distinguishes between biological (and adopted) parents and others. Specifically, ADH will issue a new birth certificate where: 1) a child has been adopted; 2) a court has made a paternity determination different than that reflected on a child's original birth certificate; 3) a child's biological parents subsequently marry; or 4) "both parents have acknowledged paternity of the [child] and request that the surname be changed from that shown on the original certificate." Ark. Code Ann. 20-18-406(a); *see* Ark. Admin. Code 007.12.1-5.2 (child is legitimated and ADH will issue a new birth certificate where biological parents subsequently marry and attest to paternity).

Neither Section 20-18-401 nor Section 20-18-406 (the only provisions that Petitioners opted to challenge) discriminate on the basis of sexual orientation. Instead, as noted above, they distinguish between individuals based on whether the individual is biologically related to (or has adopted) a child. Indeed, under

the challenged provisions, both opposite- and same-sex spouses who have no biological relation to a child are not entitled to parental rights, or inclusion on a birth certificate, unless the spouse adopts the child or another provision requires a contrary result.

Moreover, while Petitioners focus on Section 20-18-401's presumption that a mother's husband is a marital child's biological father and argue that provision must be applied equally to a mother's female spouse, they ignore the basic fact that – unlike a husband – a mother's female spouse will *never* be a marital child's biological parent. *See Paczkowski v. Paczkowski*, 128 A.D.3d 968, 969 (N.Y. App. Div. 2015) (same-sex spouse of biological parent lacked standing to seek joint custody of child because she was "neither an adoptive nor a biological parent[,]" "the presumption of legitimacy . . . is one of a biological relationship, not of legal status[,]" and "as the nongestational spouse in a same-sex marriage, there is no possibility that she is the child's biological parent."); *Q.M. v. B.C.*, 46 Misc.3d 594, 599-600 (N.Y. Fam. Ct. 2014) ("[T]he marriage equality Act does not require the court to ignore the obvious biological differences between husbands and wives" and "while the [state law] . . . requires same-sex married couples to be treated the same as all other married couples, it does not preclude differentiation based on essential biology."). Thus, while Petitioners argue that the Arkansas Supreme Court was required to disregard "even our most basic biological differences," as this Court has previously acknowledged, that approach "risks making the guarantee of equal

protection superficial, and so disserving it." *Tuan*, 533 U.S. at 73.

Further – far from being irrelevant or arbitrary – distinguishing between biological and non-biological parents fulfills numerous, and even compelling, governmental interests. Below, undisputed evidence established that Arkansas's vital records system is designed to ensure that the state's records are as accurate as practicable because biological birth records are used "to compile, maintain, and analyze vital statistics," conduct "public health research and identif[y] public health trends," and ensure that if a child "need[s] to access information about biological parentage for health-related reasons," that information is available. Pet. App. 89a; *see also id.* ("The overarching purpose of the vital records system is to ensure that vital records, including birth certificates as well as death certificates and marriage certificates, are accurate regarding the vital events that they reflect."). Indeed, that is why, as noted above, "[e]ven in the case of surrogacy where the biological mother is never intended to be the legal parent of a child, [Arkansas's] statutes provide that an initial birth certificate is issued reflecting the biological mother as a parent, and then an amended birth certificate is issued reflecting the intended parent(s) as legal parent(s)." *Id.*

And consistent with those principles, numerous other state courts have recognized that States have a legitimate interest in maintaining such information. *See, e.g.*, *Matter of Rebecca*, 158 Misc.2d 644 (N.Y. Sur. Ct. 1993) (authorizing disclosure of biological mother's

and grandmother's identity to adoptee to establish that she was full-blooded Oneida Indian under Indian Child Welfare Act); *Matter of Hanson*, 470 N.W.2d 669 (Mich. Ct. App. 1991) (authorizing release of sealed adoption records so that adoptee could learn whether she was born prematurely and might have received certain drugs that could have ongoing complications); *Kirsch v. Parker*, 383 So.2d 384 (La. 1980) (allowing adoptee to inspect records in part because records might help adoptee with treatment of medical ailments); *Matter of Chattman (Bennett)*, 57 A.D.2d 618 (N.Y. App. Div. 1977) (authorizing release of adoptee's and her parent's medical records to investigate the possibility of genetic or hereditary conditions).

In response, Petitioners merely suggest that Sections 20-18-401 and 20-18-406 do not perfectly further Arkansas's asserted interest. *See* Pet. 21-23. Yet where, as here, a law does not discriminate based on a suspect classification or concern a fundamental right, it "must be upheld against [an] equal protection challenge if there is any reasonably conceivable state of facts that could provide a rational basis for the classification." *Heller v. Doe*, 509 U.S. 312, 320 (1993) (internal citation omitted). Thus, "[e]ven if the classification involved here is to some extent both underinclusive and overinclusive, and hence . . . imperfect," it is constitutional so long as it is rationally related to the purported government interest. *Vance v. Bradley*, 440 U.S. 93, 108 (1979); *see also Sullivan v. Stroop*, 496 U.S. 478, 485 (1990); *Dandridge v. Williams*, 397 U.S. 471, 484-85 (1970). Arkansas's birth certificate provisions easily

meet that standard because even if Section 20-18-401(f) might authorize Respondent to issue a birth certificate listing a husband who is not a child's biological father, that provision reflects typicality and the statutory scheme provides a method for correcting errors.

3. Rather than challenge general provisions that are designed to ensure biological accuracy, Petitioners should have proceeded under Arkansas's artificial insemination statute. That statute represents a limited and well-defined departure from Arkansas's general, biology-based parental regime. Indeed, in the discrete circumstance where an opposite-sex couple conceives using artificial insemination, Section 9-10-201(a), deems a child "born to a married woman . . . the legitimate natural child of the woman and the woman's husband." Respondent has repeatedly conceded – consistent with decisions interpreting similar statutes (*see infra* at B) – that to survive ordinary rational basis review, that provision must be interpreted to apply equally to same- and opposite-sex couples who conceive using artificial insemination. Yet Petitioners have not challenged that provision.

II. Petitioners fail to allege any split in authority that would warrant this Court's review.

Petitioners baldly assert that "[t]he Arkansas Supreme Court's decision conflicts directly with the unanimous conclusion of other courts that *Obergefell* prohibits the discrimination at issue here" (Pet. 25), but they do not cite a *single* state or federal decision

that is inconsistent with the decision below. Instead, Petitioners attempt to conjure conflicts between a handful of federal district court decisions holding that statutes that distinguish between same- and opposite-sex couples who use *artificial insemination* are unconstitutional. Yet as noted above – and as Respondent pointed out before the state circuit court and the Arkansas Supreme Court – Petitioners have *not* challenged Arkansas's artificial insemination statute.

Petitioners cite *Roe v. Patton*, 2015 WL 4476734, *1 (D. Utah July 22, 2015). But that case involved a challenge to Utah's assisted reproduction statute which – mirroring Section 9-10-201(a) – provided that a child born to a married woman using artificial insemination was deemed her husband's child so long as the husband consented to the use of assisted reproduction. *Id.* Consistent with Respondent's *repeated* concession here, *Roe* concluded that Utah had no "rational basis for the different treatment of male and female spouses of women who give birth through assisted reproduction involving the use of donor sperm." *Id.* at *3. Similarly, *Torres v. Seemeyer*, 2016 WL 4919978, *6-8 (W.D. Wis. Sept. 14, 2016), granted summary judgment under Wisconsin's artificial insemination statute to a class of same-sex married women who claimed that Wisconsin's artificial insemination statute was being unevenly enforced. Tellingly, in reaching that conclusion, *Torres* admonished the plaintiffs in that case for continuing to argue – as Petitioners here have – that *Obergefell* required the court to grant much broader relief "on behalf of all married female couples who gave

birth to a child after same-sex marriage was legalized in Wisconsin" after Wisconsin had conceded that the plaintiffs were entitled to equal treatment under the artificial insemination statute. *Id.* at *6; *see also id.* at *5 (noting Wisconsin's concession).

Petitioners also cite *Henderson v. Adams*, 2016 WL 3548645 (S.D. Ind. June 30, 2016). That case invalidated Indiana's general presumptive paternity statutes because those provisions provided that a child born to a married mother is presumed to be her husband's child but do not contain a similar presumption for a mother's female spouse. But Petitioners ignore the fact that Indiana's paternity statutes – unlike Arkansas's, Utah's, and Wisconsin's "more comprehensive statutory scheme[s]" – did not separately "address parentage, artificial insemination, and birth certificates." *Id.* at *12. Thus, unlike here – and in *Roe* and *Torres* – there was no argument that any Indiana provision other than the general paternity statutes ought to control and the issue was whether Indiana's general paternity statutes were unconstitutional. Moreover, to the extent *Henderson* might be construed as inconsistent with every other decision cited by the Petitioners and the decision below, review is not warranted because *Henderson* is currently being reviewed by the United States Court of Appeals for the Seventh Circuit and there is no reason to believe that court's decision will be inconsistent with every other decision.

III. Even if the question presented warranted this Court's review, this case would be an unsuitable vehicle in which to address it.

It is undisputed that Respondent long ago issued valid birth certificates to Petitioners' children listing their respective biological mother and her spouse. Therefore, Petitioners – who have not suffered an injury-in-fact – are particularly ill-suited to challenge Sections 20-18-401 and 20-18-406.

Seeking to avoid that problem, Petitioners now represent that "one of the petitioner couples is again expecting a child, and the birth mother's spouse . . . again seeks recognition of her right . . . to be listed as the child's parent on the birth certificate." Pet. 11 n.2. But that representation does not demonstrate that review is warranted here because – as Respondent has *repeatedly* conceded and courts interpreting similar statutes have recognized – if Petitioners had sought relief under Arkansas's artificial insemination statute (rather than Sections 20-18-401 and 20-18-406), to survive ordinary rational basis review, Respondent would have been required to accord Petitioners the same rights as an opposite-sex couple who had conceived using artificial insemination. Given that concession, Petitioners cannot point to any threatened future harm since, if Petitioners proceeded under the proper statute, Respondent will accord them the same rights as a similarly-situated opposite-sex couple. *Cf. Virginia*

v. Am. Booksellers Ass'n, Inc., 484 U.S. 383, 393 (1988). Thus, review is not warranted.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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